

Capitol Unrest, Legislative Response, and the Bill of Attainder Clause

January 22, 2021

On January 6, 2021, a crowd gathered on the U.S. Capitol grounds, breached police barriers, entered and occupied portions of the Capitol building, and [clashed](#) with law enforcement. The incident resulted in at least [five deaths](#), dozens of injuries, and damage to federal property. Members of Congress and the Vice President, who were counting electoral votes for the 2020 presidential election, were [forced to evacuate](#) in response to the unrest. Following the incident, some [Members of Congress](#) and [other commentators](#) have called for accountability for the individuals directly involved in the incident, as well as for others, potentially including elected officials, who may have [incited or supported the unrest](#).

Many of those calls for accountability raise complex legal issues. As a recent CRS [Legal Sidebar](#) explains, the incident may implicate numerous provisions of existing criminal law. In addition, on January 13, 2021, the House of Representatives [impeached President Donald Trump](#) for incitement of insurrection based on the events of January 6. Lawmakers and commentators have also explored imposing liability under other legal authorities, including by passing [new legislation](#) or seeking to [bar certain individuals from holding office](#) under [Section 3 of the Fourteenth Amendment](#).

This Legal Sidebar addresses one of the more novel issues that these proposals may raise. The [Bill of Attainder Clause](#) prohibits Congress from enacting legislation that inflicts punishment on an individual basis without a judicial trial. This Sidebar provides an overview of the Bill of Attainder Clause and presents certain related legal considerations for Congress as the legislature responds to the Capitol unrest.

The Bill of Attainder Clause

[Article I, Section 9](#), of the Constitution provides that Congress shall pass “No Bill of Attainder or ex post facto Law.” [Article I, Section 10](#), likewise prohibits the states from enacting bills of attainder. (Thus, there are two Bill of Attainder Clauses; this Sidebar uses the singular “Bill of Attainder Clause” to refer to the clause that binds Congress.) The Supreme Court has [described](#) a bill of attainder as “a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial.” Bills of attainder were [common in England](#) before the Founding, primarily targeting individuals accused of disloyalty to the government. Bills of attainder were also used in the [American colonies](#). However, the Framers of the U.S. Constitution chose to depart from that historical practice. The Supreme Court has [explained](#) that the constitutional prohibitions on bills of

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Pocket Constitution



The Declaration of Independence
The Constitution of the United States
The Bill of Rights
Amendments XI–XXVII
Gettysburg Address



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attainder “reflect[] the Framers’ belief that the Legislative Branch is not so well suited as politically independent judges and juries to the task of ruling upon the blameworthiness of, and levying appropriate punishment upon, specific persons.”

Individuals who believe they are subject to a bill of attainder may challenge the relevant legislation in court. If a court finds that the legislation is a bill of attainder, it can [declare the law unconstitutional](#). Judicial decisions invalidating laws as bills of attainder are relatively rare, but key cases dating back to the [Reconstruction Era](#) provide a framework for evaluating bill of attainder claims. The Supreme Court outlined the current test for bill of attainder claims in the 1977 case *Nixon v. Administrator of General Services*. In that case, the Court [held](#) that legislation constitutes a bill of attainder if it both (1) applies with specificity and (2) imposes punishment without trial. The following sections discuss each of those elements in turn.

Specificity

A law that singles out one or more individuals by name satisfies the specificity requirement. For instance, in *United States v. Lovett*, the Supreme Court struck down as a bill of attainder “an Act specifically cutting off the pay of certain named individuals [federal employees] found guilty of disloyalty.” Likewise, a provision of the legislation at issue in *Nixon* applied [only to former President Richard M. Nixon](#). Known as the Presidential Recordings and Materials Preservation Act, that statute directed the Administrator of General Services to take custody of Nixon’s presidential papers and tape recordings and promulgate regulations to govern the processing and preservation of those materials. The Supreme Court acknowledged “the Act’s specificity—the fact that it refer[red] to [Nixon] by name.”

Legislation that does not identify a targeted individual by name may satisfy the specificity requirement as well. In *Foretich v. United States*, the U.S. Court of Appeals for the D.C. Circuit considered a federal statute that responded to a high-profile child custody dispute by limiting the visitation rights of a father accused of sexually abusing his daughter. The D.C. Circuit ruled that the legislation [applied with specificity](#) because, “[a]lthough Congress stopped short of including the names” of the parents or child “in the text of the statute, the applicability of the Act depend[ed] on such a narrow set of circumstances that it applie[d] to no known cases other than” the custody dispute that prompted the legislation.

A law may also apply with specificity if it targets members of an identifiable group. For example, in the Reconstruction-era case *Cummings v. Missouri*, the Supreme Court struck down as a bill of attainder a provision of the Missouri state constitution that effectively barred former Confederate sympathizers from engaging in certain vocations. Likewise, in the 1965 case *United States v. Brown*, the Court held that a statute making it a crime for any member of the Communist Party to serve as an officer of a labor union was a bill of attainder.

Legislation that targets a specific corporation may also satisfy the specificity requirement. While the Supreme Court has not decided whether the Bill of Attainder Clause protects entities such as corporations, several lower federal courts have either [held](#) or [assumed](#) that [it does](#).

Punishment

Specificity standing alone is never sufficient to support a finding that a law is a bill of attainder. The *Nixon* Court [rejected](#) the proposition that an individual or defined group is subject to a bill of attainder “whenever he or it is compelled to bear burdens which the individual or group dislikes.” Congress is not limited to “the choice of legislating for the universe, or legislating only benefits, or not legislating at all.” Instead, the *Nixon* Court [explained](#), Congress may in some circumstances create “a legitimate class of one.” Thus, if a law applies with specificity but does not impose punishment, it will not be struck down as a bill of attainder.

The test for whether a law imposes punishment is complex and [fact-based](#). In *Nixon*, the Supreme Court laid out [three tests](#) for assessing whether a law imposes punishment: (1) historical, (2) functional, and (3) motivational. Federal appeals courts have stated that [none of the three tests is decisive](#), and [not all three tests need to be satisfied](#) for a law to be punitive.

The Historical Test

The [first authority](#) courts consult in considering whether a law imposes punishment is “[t]he infamous history of bills of attainder.” This historical test for punishment deems a statute to be punitive if it is one of a limited set of legislative actions that were found to be bills of attainder from before the Founding through the mid-20th century. [At English common law](#), a bill of attainder was legislation imposing the death penalty without a judicial trial. That definition later expanded to include “[bills of pains and penalties](#)” that imposed other forms of criminal punishment such as banishment, imprisonment, or confiscation of property without trial. American courts further expanded the historical definition of *punishment* to include employment bans that prevent specific individuals or members of discrete classes from holding certain types of jobs. The vocational restrictions for Confederate sympathizers at issue in *Cummings*, the criminal prohibition of Communists serving as union officers in *Brown*, and the legislation that prevented named individuals accused of being “subversives” from drawing a federal salary in *Lovett* are all examples of employment bans that are considered “punishment” under the historical test.

However, courts have generally declined to extend historic jurisprudence related to employment bans to include restrictions on corporations. As an example, in *Kaspersky Lab, Inc. v. Department of Homeland Security*, Russia-based cybersecurity company Kaspersky Lab brought a bill of attainder challenge to a provision of the National Defense Authorization Act for Fiscal Year 2017 that barred the U.S. government from using any Kaspersky Lab products or services. The D.C. Circuit rejected the challenge, [holding](#) that none of the three tests for punishment was satisfied. With respect to the historical test, the court rejected the company’s argument that the ban on federal contracting with Kaspersky Lab was analogous to prior cases involving individual employment bans. The court [explained](#) that “although we assume that the Bill of Attainder Clause protects corporations as well as [natural persons](#), we have no basis for likewise assuming that corporate entities feel burdens in the same way as living, breathing human beings.” In *ACORN v. United States*, the Second Circuit similarly [held](#) that withholding federal appropriations from a named company “does not constitute a traditional form of punishment,” noting, “There may well be actions that would be considered punitive if taken against an individual, but not if taken against a corporation.”

The Functional Test

The functional test is generally the [most important](#) of the three tests for punishment. This test [considers](#) “whether the law under challenge, viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes.” The functional test [serves](#) to prevent formalistic evasion of the Bill of Attainder Clause, recognizing that there may be measures that were not historically recognized as punishments that are nonetheless impermissibly punitive. But at the same time, the U.S. Court of Appeals for the Fifth Circuit has [stated](#) that even some laws imposing penalties that *were* historically considered punishments may not violate the Bill of Attainder Clause if the “legislation has a legitimately nonpunitive function, purpose, and structure.”

The functional test is fact-specific. It first considers whether the statute has a non-punitive purpose. Courts apply a [level of scrutiny](#) somewhat more stringent than the most deferential [rational basis review](#), requiring what the D.C. Circuit has [called](#) “not some conceivable nonpunitive purpose, but rather an actual nonpunitive purpose.” If such a purpose exists and the challenged law reasonably serves that purpose, courts generally find that the law is not punitive. For instance, in *Nixon*, the Supreme Court [held](#) that the Presidential Recordings and Materials Preservation Act did not function as punishment because it

served the nonpunitive purposes of retaining materials relevant to the prosecution of the Watergate break-in and preserving records with historical significance. In *Kaspersky*, the D.C. Circuit [held](#) that a statute prohibiting the U.S. government from using products or services from Kaspersky Lab served a nonpunitive interest in promoting “the security of the federal government’s information systems.” In *SBC Communications, Inc. v. Federal Communications Commission*, the Fifth Circuit [held](#) that a statute barring specific telecommunications companies from engaging in certain business activities served the nonpunitive purpose of “attempting to ensure fair competition in the [telecommunications] markets.”

If a nonpunitive purpose is evident, the court considers whether the challenged legislation is [over- or underinclusive](#) in view of its aims and whether [less burdensome alternatives](#) could have accomplished the same goals. “A [grave imbalance](#) or disproportion between the burden and the purported nonpunitive purpose suggests punitiveness, even where the statute bears some minimal relation to nonpunitive ends.” Thus, in *Foretich*, the D.C. Circuit [held](#) that a statute altering the visitation rights of a father accused of sexually abusing his child constituted a bill of attainder, in part because of the imbalance between the burden the statute imposed and the statute’s “implausible nonpunitive purposes.” And in *Consolidated Edison Co. v. Pataki*, the Second Circuit [concluded](#) that legislation barring a company from recovering certain costs from customers, on the stated basis that the company had “failed to exercise reasonable care” in its business, functioned as punishment because the court could “discern no wholly non-punitive purpose to justify” the law.

The Motivational Test

The [third and final test](#) for punishment considers whether the legislature that enacted a challenged law was motivated by an intent to punish the targeted person(s). Courts applying this test examine the bill’s text and legislative history to determine whether lawmakers expressed punitive intent.

The motivational test is not usually dispositive. The *Nixon* Court [opined](#) that a law may qualify as a bill of attainder even without a “formal legislative announcement of moral blameworthiness or punishment.” Moreover, if the historical and functional tests are not satisfied, the motivational test standing alone does not [compel a finding that a law is punitive](#) unless the reviewing court finds “[unmistakable evidence](#) of punitive intent.” However, a significant amount of punitive language in congressional documents or legislative debate may support a finding that a law imposes punishment. For instance, committee reports on the legislation at issue in *Lovett* [characterized](#) the affected individuals as “guilty of having engaged in ‘subversive activity’” and “unfit” for government service. In *Foretich*, the D.C. Circuit [cited](#) statements of multiple legislators characterizing the child at the center of the custody dispute as a “victim” and the legislation as “deal[ing] with the inadequacies of the court system” and “bringing justice” to her family.

By contrast, isolated statements by a few lawmakers generally do not suffice to show a legislative intent to punish. In *Kaspersky*, the D.C. Circuit [considered](#) one Senator’s statements that the “case against Kaspersky Lab [wa]s overwhelming” and that “strong ties between Kaspersky Lab and the Kremlin [we]re alarming and well-documented.” The court concluded that “even if [the Senator’s] statements did reveal a personal desire to punish Kaspersky, the company cite[d] no corroborating evidence indicating that other members of Congress shared her supposedly punitive motivations.” In *ACORN*, an organization that had been excluded from receiving federal funding cited statements of “nearly ten members of the House of Representatives” labeling the organization as corrupt and accusing it of specific offenses. The Second Circuit [concluded](#), “Despite the evidence of punitive intent on the part of some members of Congress, unlike in *Lovett*, there is no congressional *finding* of guilt in this case.” The court thus held that the statements were “insufficient to establish—by themselves—the clearest proof of punitive intent necessary for a bill of attainder.”

Considerations for Congress

Some proposed legislative responses to the January 6, 2021, unrest at the Capitol may raise questions under the Bill of Attainder Clause (among other [legal authorities](#) that may apply when Congress enacts legislation imposing new legal consequences for past events). The principles and case law discussed above suggest some ways that Congress could avoid bill of attainder issues in addressing those events.

The Bill of Attainder Clause applies only to punishments imposed without a judicial trial, so prosecuting individuals involved in the unrest at the Capitol under existing laws would not raise bill of attainder concerns. (However, amending criminal laws to criminalize past conduct or increase criminal penalties for existing offenses might implicate the related constitutional prohibition on [ex post facto laws](#). Thus, while the incident at the Capitol has prompted some calls for [new domestic terrorism laws](#), any new penal laws could apply only on a prospective basis.)

By contrast, if Congress enacted legislation specifically identifying one or more [individuals](#) or groups allegedly involved in the unrest at the Capitol and [imposing legal consequences](#) on them, those people might challenge such laws as bills of attainder. Congress could seek to mitigate any bill of attainder concerns by ensuring that proposed legislation does not fit within the historical categories of punishment subject to the Bill of Attainder Clause, that it reasonably serves a nonpunitive purpose, and that the statutory text and legislative history do not reflect an intent to punish. As with any bill of attainder litigation, however, the outcome of such a challenge would depend on the specific facts of the case.

Congress might also address the unrest at the Capitol through enforcement of [Section 3 of the Fourteenth Amendment](#) against current or potential government officeholders. Section 3 applies to any person who

having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof.

The Fourteenth Amendment bars such persons from holding certain government offices unless two-thirds of each chamber of Congress votes to remove the bar. Congress might seek to enforce the bar through legislation, or a house of Congress might refuse to seat or expel certain Members based on the provision. Section 3 has not been used in [over a century](#), and invoking the provision could raise numerous novel legal questions. One such question is whether legislation enforcing Section 3 could violate the Bill of Attainder Clause. As the amendment was ratified following the Civil War to prevent former Confederate sympathizers from holding government office, some argue that Section 3 [carves out an implicit exception](#) to the Bill of Attainder Clause. Others [counter](#) that the Fourteenth Amendment “seek[s] to confirm and improve, rather than to weaken and impair the general spirit of the [C]onstitution,” and thus congressional enforcement of Section 3 “should respect the Constitution’s existing procedural guarantees against targeted legislative punishment.” To avoid bill of attainder concerns in enforcing Section 3, Congress might provide a judicial trial for alleged violations of the provision. That approach would be consistent with the Reconstruction-era [Enforcement Act of 1870](#) and a current (but [seldom used](#)) criminal statute, [Title 18, Section 2383, of the United States Code](#).

In addition, Congress has addressed the events at the Capitol through the impeachment process. The House of Representatives [impeached President Trump](#) on January 13, 2021, for [incitement of insurrection](#), alleging that he provoked the incident at the Capitol by making false claims about the 2020 presidential election. The Senate did not conduct a trial on the impeachment before the end of President Trump’s term. One scholar has specifically [suggested](#) that impeaching or removing a president who has left office could raise bill of attainder issues. [A recent Legal Sidebar](#) discusses issues related to the timing of impeachment in more detail.

Author Information

Joanna R. Lampe
Legislative Attorney

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